

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054**

In the Matter of	)	
	)	
WideOpenWest Finance, LLC	)	CSR-7139-Z
	)	
Request for Waiver of Section 76.1204(a)(1)	)	CS Docket No. 97-80
of the Commission's Rules	)	

**REPLY OF WIDOPENWEST FINANCE, LLC**

Pursuant to 47 C.F.R. § 76.7(c), WideOpenWest Finance, LLC (“WOW”) submits this reply to the comments filed in response to its Request for Waiver of 47 C.F.R. § 76.1204(a)(1)(“Request for Waiver”).<sup>1</sup> For the reasons set forth in its Request for Waiver and the Supplement thereto<sup>2</sup>, WOW has clearly satisfied the waiver standards set forth in Section 629 of the Communications Act, as well as the general waiver provisions of Section 1.3 and 76.7 of the Commission’s rules.

Only two sets of comments were filed in connection with WOW’s Request for Waiver, one of those in support of and the other in opposition to WOW’s request. For the reasons set forth herein, the single opposing filing by the Consumer Electronics Association (“CEA”) does not present a single argument that would justify denial of WOW’s waiver request.

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<sup>1</sup>*In the Matter of WideOpenWest Finance, LLC’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, CSR-7139-Z, CS Docket No. 97-80 (filed February 28, 2007).

<sup>2</sup> Letter from Mr. D. Craig Martin to Ms. Marlene H. Dortch (filed May 10, 2007)(the “Supplement”).

In the first two and one-half pages of its Comments, CEA: (i) misstates that WOW is seeking a “complete exemption” from the Integration Ban, (ii) either purposefully or carelessly mischaracterizes WOW’s “bases” for waiver, including a pointless “accusation” that WOW claimed as one of its “bases” for waiver that it is entitled to waiver because DBS received a “waiver”; (iii) mistakenly asserts that WOW operates an “analog-only cable system;” (iv) falsely states that WOW is “only now” acquiring a fleet of integrated security boxes; (v) mischaracterizes WOW’s plans to move to a system that resembles Comcast; and (vi) misleadingly states that WOW “cited” in its Request for Waiver that its vendor has “chosen not to field a low-end product that complies with the FCC rules.”

**A. WOW is Seeking a Limited Time Waiver from the Integration Ban; in the Alternative, WOW has Asked for Waiver for the Pace Micro Chicago and SA Explorer 940**

WOW does not ask for a complete exemption from the Integration Ban, as asserted by CEA; rather, WOW seeks only a limited time waiver of the Integration Ban for facilities based cable competitors based upon the commercial availability of DCAS. Furthermore, WOW asks in its May 10, 2007 Supplement to its Request for Waiver (the “Supplement”) for waiver until February 17, 2009, or, in the alternative, until the earlier of February 17, 2009, or the date that WOW achieves 15% digital penetration of its homes passed.<sup>3</sup> Finally, WOW did, in the alternative, ask in its Request for Waiver for waiver of the Pace Micro Chicago and SA Explorer-940 boxes.

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<sup>3</sup> In its Request for Waiver, WOW asks for waiver of the Integration Ban until the development and industry-wide commercial deployment of downloadable conditional access. CEA objects to WOW’s mere mention of the availability of downloadable security (*CEA Comments*, p. 4), and again misses the point: as a competitive provider, WOW seeks to deploy the most cost-competitive solution to separated security, which WOW believes will be in the form of downloadable security.

**B. WOW Seeks Waiver Based on the “Public Interest, “Good Cause” and “Necessary to Assist” Standards found in the Law and Commission Rules, not the “Bases” Recited by CEA**

CEA identifies what it says are the “three bases” for WOW’s Request for Waiver, only one of which is accurate.<sup>4</sup> WOW actually seeks under the “public interest”<sup>5</sup>, “good cause”<sup>6</sup> and “necessary to assist”<sup>7</sup> standards a limited time waiver of the Integration Ban for facilities based cable competitors. WOW has provided information within its Request for Waiver and Supplement that demonstrate “good cause” exists for grant of a limited time waiver to competitors like WOW, as the “public interest” will be well-served by ensuring the continued viability of existing, wireline competition.

CEA’s other claims are wrong or misleading. For example, CEA asserts that WOW claims it deserves a waiver because DBS already received a waiver. CEA goes so far as to claim that WOW has “misunderstood” and “mischaracterized” the Commission’s actions toward DBS as a “waiver,”<sup>8</sup> as if, even if that were true, it has some significance in the context of WOW’s Request for Waiver. The point clearly made by WOW relative to DBS is that new competitive cable operators like WOW are similar to DBS in that both are “new” competitive entrants. The Commission clearly stated when it declined to apply the Integration Ban to DBS providers that “in many instances,

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<sup>4</sup> *CEA Comments*, p. 1.

<sup>5</sup> *See* 47 C.F.R. § 76.7 (“On petition by any interested party, ... the Commission may waive any provision of this part 76, ....”).

<sup>6</sup> *See* 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion . . . if good cause therefor is shown.”)

<sup>7</sup> 47 U.S.C. § 549(c). Section 76.1207 of the Commission’s rules implements Section 629(c) of the Act and tracks the text of the statute nearly verbatim. 47 C.F.R. § 76.1207.

<sup>8</sup> *CEA Comments*, p. 3.

the Commission refrains from imposing regulations on new entrants.”<sup>9</sup> Or, as stated by the Bureau in the *BendBroadband Order*, waivers of regulations are to be granted when doing so “‘is necessary to assist the development or introduction of a new or improved’ service, *such as, for example, a nascent MVPD offering from a new competitor.*”<sup>10</sup>

CEA claims that WOW seeks waiver because it “operates an analog cable system.”<sup>11</sup> Nowhere in WOW’s Request for Waiver has WOW asserted that it runs an analog-only system. In fact, WOW clearly says in its Request that it “has already launched digital service in its markets.”<sup>12</sup> Moreover, WOW does in fact support CableCARDS, and recently launched Caller ID to the TV set and VOD which are both digital services.

**C. A Limited Time Waiver is both in the Public Interest to Preserve and Promote Competition for New Competitive Providers, and “Necessary to Assist” Such Operators in the Introduction and Development of New Competitive Services**

CEA says that WOW should not be granted a waiver as a new entrant that provides a new service for the reason that, according to CEA, WOW provides no “cutting

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<sup>9</sup> See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14801, ¶ 65 (1998) (“*First Report and Order*”).

<sup>10</sup> *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 209 (2007) (“*BendBroadband Order*”), ¶ 2 (citing to the *First Report and Order* discussion of the DBS exemption).

<sup>11</sup> *CEA Comments*, pp. 1-2. In related comments, CEA then, based on this false premise, accuses WOW of not providing CableCARDS to its customers, as it reported in its Request for Waiver.

<sup>12</sup> Request for Waiver, p. 25. As reported in its Request for Waiver (page 26): WOW’s overall video penetration in the markets it serves is about 25%, and of this 25%, only 31% of WOW’s customers subscribe to WOW’s digital service. WOW’s December 31, 2006 digital penetration in the marketplace is thus between 7% and 8%, **at least four times lower** than the typical incumbent cable system operator such as Comcast and Time Warner that has enjoyed a monopolistic market for decades. Using the Commission’s June 2005 statistics, if we assume an average market penetration of 60% for a traditional cable operator, and an average digital penetration of 47%, the average traditional cable operator has a digital penetration of over 28%, or about 4 times higher than WOW’s 2007 digital penetration, and about 5 times higher than WOW’s June 2005 digital penetration.

edge” service.<sup>13</sup> We do not find the CEA-created “cutting edge” service waiver standard anywhere in the law or Commission rules. Nonetheless, WOW is in fact introducing and developing *competitive* advanced services including caller ID to the TV set, HDTV and video on demand, HSD, and VOIP-enabled phone services. The Commission recognizes that waiver is warranted where necessary to assist “a nascent MVPD offering from a new competitor.” In the case of WOW, such a waiver will extend to only a few competitive providers,<sup>14</sup> and will have no adverse impact on the retail market for set-top boxes.<sup>15</sup>

**D. A Commitment to Go “All-Digital” is Not the Only Basis for Waiver of the Integration Ban**

It appears that CEA now endorses the Bureau’s *BendBroadband* rationale for waiver when it criticizes WOW’s alleged plan to move to a Comcast-like system “rather than conforming to its purported model of Bend Broadband.”<sup>16</sup> Although CEA’s point is unclear, it seems that CEA claims now that the only appropriate basis for waiver of the Integration Ban is a commitment to go “all-digital.” That is certainly one basis for

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<sup>13</sup> CEA Comments, p. 5.

<sup>14</sup> The Commission has correctly reported in its competition assessments that there is little existing direct wireline competition in the country. See, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MB Docket No. 05-255 (March 3, 2006)(“*Twelfth Annual Report*”)(“*Relatively few consumers...have a second wireline alternative, such as an overbuild cable system, as indicated by the small number of subscribers to BSPs and the limited entry by LEC thus far.*”), ¶144 (emphasis added). The Commission reports that “BSPs, which typically operate overbuild systems, reported no appreciable change in subscribership since last year, maintaining total subscribership of approximately 1.4 million”, or 1.49% of the total MVPD market. See, *Twelfth Annual Report*, ¶9 and Appendix B.

<sup>15</sup> See discussion in WOW Request for Waiver, pp. 19-21. See also, *In the Matter of City of Tacoma d/b/a Click! Network Emergency Petition for Waiver of 47 C.F.R. § 76.1204(a)(1)*, CSR-7141-Z, CS Docket No. 97-80, Reply of the American Cable Association (filed May 11, 2007), pp. 1-2 (“As CEA has repeatedly conceded in this docket, small cable operators like the City have absolutely no ability to influence the commercial market for navigation devices. Because the only reason for the integration ban is to encourage the commercial market for navigation devices, CEA is effectively admitting that there is no reason to apply the integration ban to small operators like the City.”).

<sup>16</sup> CEA Comments, p. 2.

waiver endorsed by the Bureau. But the Bureau has also granted waiver in other circumstances, such as where compliance with the Integration Ban would cause financial hardship.<sup>17</sup> (The operational and financial constraints of an overbuilder such as WOW competing directly against entrenched incumbents have been recognized previously by the Commission.<sup>18</sup>)

**E. Waiver Should be Granted to Competitive Providers Like WOW in Order to Ensure the Continued Viability of Existing Wireline Competition**

Rather than focus on the standards for waiver found in the statute and Commission rules, CEA summarily concludes in its Comments that overbuilders do not deserve waiver, because a waiver to a competitive provider like WOW would not maintain “respect for Commission regulations.”<sup>19</sup> CEA seems oblivious to the Commission’s overriding, stated goal of preserving and fostering direct competition in the marketplace. Chairman Martin just this past week described the Commission’s regulatory focus in this way:

“Competitive forces spur innovation and push prices down. When a regulatory issue comes before me, my first instinct is to pick the action that will help facilitate and promote competition, innovation, and consumer choice. Sometimes that is de-regulation. Sometimes that is enforcing existing regulations designed to level the playing field or promote new entry. I have tried to apply such competitively and technologically neutral policies consistently across all platforms. ...

So consistent with my commitment to fostering a competitive marketplace and consumer choice, I have and will continue to side with the new entrants trying to break into the market where *you* are the traditional incumbent....

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<sup>17</sup> See, *In the Matter of Charter Communications, Inc. Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Memorandum Opinion and Order, CSR-7049-Z, CS Docket No. 97-80 (Rel. May 4, 2007)(“*Charter Waiver Order*”).

<sup>18</sup> See discussion in WOW Request for Waiver, pp. 8, 15-17, 22-23.

<sup>19</sup> *CEA Comments*, ¶ 5.

Finally, I would be remiss were I not to mention an issue which is at the forefront of many of your minds. That is the looming July 1<sup>st</sup> deadline of the set top box integration ban. As you have seen, we are in the process of ruling on the multitude of waiver petitions that have recently been filed with us. Fundamentally, I am for innovation. It leads to new and improved services, and ultimately lower prices. When someone is innovating with voice competition, I am on their side. When someone is trying to slow set-top box innovation, I am not.”<sup>20</sup>

As one of the original and few remaining overbuilders, WOW is the exact type of “new entrant” and “innovator” that Chairman Martin and Congress hoped would emerge through the 1996 Act and the Commission’s regulatory framework. As described in WOW’s Request for Waiver and numerous Commission pronouncements and studies, there are two undeniable facts regarding facilities based competition: first, the presence of a wireline competitor like WOW results in lower prices and better products and services; and, second, competing against huge, entrenched incumbent operators is difficult, as is evidenced by the fact that most overbuilders have failed, and those that have not suffer from low penetration, low margins, and high cost structures.

CEA concludes that all cable operators are the same, whether a long-time incumbent or a new competitive provider. That is where CEA’s comments miss the mark. Like DBS before it, overbuilders like WOW entered the marketplace in the early 2000s to provide direct competition to established cable incumbents. A competing cable operator like WOW “cannot expect to capture more than a fraction of the market” but will compete “for the opportunity to capture a relatively small percentage of the

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<sup>20</sup> Remarks of FCC Chairman Kevin J. Martin, National Cable & Telecommunications Association, Las Vegas, NV, May 7, 2007 (As Prepared For Delivery).

market.”<sup>21</sup> The Integration Ban will force WOW into a business model that is contrary to prudent competitive behavior and ultimately threaten its ability to compete.

### **CONCLUSION**

The CEA’s comments are largely inaccurate. Most importantly, CEA fails to recognize the important and evident distinctions between long-time incumbent cable providers and new competitive providers. In short, “[m]arket conditions today are far different from when incumbent cable operators obtained their franchises.”<sup>22</sup> Those market conditions have created economic circumstances for competitive providers such as WOW that justify a limited time waiver of the Integration Ban as requested by WOW — until the earlier of February 17, 2009, or the date that WOW achieves 15% digital penetration of its homes passed.

Respectfully submitted,

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General Counsel for  
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<sup>21</sup> *Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 06-180 (rel. March 5, 2007) (the “*Franchising Order*”), ¶88. The Commission’s 2005 annual cable price survey found that average monthly cable rates varied markedly depending on the presence – and type – of MVPD competition in the local market. The greatest difference occurred where there was wireline overbuild competition, where average monthly cable rates were 20.6 percent lower than the average for markets deemed noncompetitive. *Franchising Order*, ¶36.

<sup>22</sup> *Franchising Order*, ¶87.



## CERTIFICATE OF SERVICE

I do hereby certify that on May 14, 2007 I caused a true and correct copy of the foregoing Reply Comments of WideOpenWest Finance, LLC to be served via regular U.S. mail on the following:

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